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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 718

IN THE MATTER OF
FLOYD WOODRUFF AND DOLLY WOODRUFF,
Bankrupt.

CHARLES H. SPARRENBERGER, TRUSTEE IN BANKRUPTCY,
Petitioner,

vs.

NATIONAL CITY BANK OF EVANSVILLE, INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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NATIONAL CITY BANK OF EVANSVILLE, INDIANA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles H. Sparrenberger, Petitioner herein, by his Attorney, William L. Mitchell, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on December 14, 1959.

OPINIONS BELOW

The memorandum opinion of the Referee in Bankruptcy (R. 41-45) is unreported, and is preceded by a special finding of facts and conclusions of law. (R. 39-41.)

The memorandum opinion of the District Court (R. 46-49) is unreported. The judgment of the District Court (R. 49-50) and order amending judgment (R. 50) are unreported.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 272 Fed. (2d) 696.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 14, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTION PRESENTED

Bankrupt mortgagors on October 5, 1951, executed a mortgage, installment note, payable to Respondent, for $16,000, due October 6, 1961, and a securing mortgage on real estate, of even date therewith, specifically describing the secured note and the method of payment in the consideration clause, followed by provisions for the inclusion of other charges, if paid by the Respondent mortgagee on default of the mortgagors, as a further lien on the mortgaged premises, and, then, at the last numbered paragraph of the printed form provided that the mortgage shall also secure any and all renewals of the promissory note, and the payment to mortgagee of any other indebtedness which mortgagors may, from time to time, while this mortgage is in effect, owe the mortgagee.

Thereafter, and on November 24, 1956, the same parties executed to and in favor of Respondent, a promissory note

in ordinary bank form for $46,000 payable, with interest, 90 days after date.

Later, on bankruptcy of the makers, the latter obligation was presented to the Bankruptcy Court as secured by the mortgage of October 5, 1951, and the Petitioner Trustee made objection thereto and questioned the subsequent indebtedness as a secured claim.

The primary question, therefore, is whether or not the subsequent advancement by the Respondent, is comprehended by, and comes within the coverage of, the prior mortgage, as against general creditors of the bankrupt.

The primary question, immediately above stated, is amplified under *Specifications of Error To Be Urged, Infra.*

STATEMENT OF THE CASE

The mortgage note, so designated on its face, of October 5, 1951, was executed by the makers, as individuals, and listed their residence address. (R. 36.)

The mortgage was executed individually and was duly recorded. (R. 27-34.)

The promissory note of November 24, 1956, was executed by Floyd Woodruff and his name typed under his signature as doing business as American Cleaners & Dyers, while Dolly Woodruff signed it at the lower, lefthand corner as "Dimples Woodruff". The business address of Floyd Woodruff was listed under his signature. (R. 35.)

On December 6, 1956, Kenneth O. Henke, Vice President of Respondent Bank, made an affidavit, recorded the same day, without statutory requirement or authority, reciting the prior mortgage and the amount presently payable thereunder, and, further, stating that the purpose of the affidavit was to give notice of the fact that the note of November 24, 1956, was secured by the prior mortgage under paragraph 14 thereof. (R. 17-20.)

The bankrupts filed their voluntary petition in bankruptcy on November 22, 1957, and on that date were adjudged bankrupts, and reference made to Honorable Paul A. Pfister, Referee in Bankruptcy. (R. 1.)

The promissory note of November 24, 1956, as first prepared, bore interest at 5% but on July 7, 1957, the rate was increased to 5½%. (R. 37.)

The facts were stipulated before the Referee in Bankruptcy (R. 13-37) and the two notes and the real estate mortgage became, and were made, a part of the stipulation.

The mortgage, the mortgage note secured by it, and the subsequent promissory note, were prepared on printed forms of the Respondent with blank spaces for insertion of the desired data.

The claim of Respondent, filed in the bankruptcy proceeding (R. 22-38), is in the usual form of a claim asserted as secured, and, to the extent it may exceed the value of the security claimed, as an unsecured claim.

The objection of the Petitioner-Trustee is directed to the inclusion of the subsequent and larger note within the coverage of the mortgage. (R. 38-39.)

The memorandum opinion of Honorable Paul A. Pfister, Referee in Bankruptcy (R. 41-45), denied the inclusion of the November 24, 1956 note under the mortgage as secured thereby.

On review at the instance of Respondent, under Section 2 a (10) of the Bankruptcy Act, the District Judge allowed the entire claim of Respondent, principal, interest, and attorney's fees, as secured by the mortgage, and rendered judgment accordingly. (R. 49-50.)

Following the decision of the District Judge, and pursuant to Section 24a of the Bankruptcy Act, an appeal was taken by Petitioner-Trustee to the United States Court of Appeals for the Seventh Circuit. In an opinion by Judge

Knoch, dated December 14, 1959, a three-judge Court of Appeals affirmed the Court below. This petition followed pursuant to the jurisdictional provisions of Section 24c of the Bankruptcy Act, and to 28 U. S. C. A. Sec. 1254 (1).

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred in the following respects, and each one thereof:

1. In holding that the intent of the parties to the mortgage is a determinative resultant of paragraph 14 thereof, notwithstanding the acts and conduct of the parties, inconsistent with the intent as found and construed by the Court.

2. In accentuating the construction of paragraph 14 of the mortgage, and in giving it controlling effect, without due regard to the cardinal rule of construction that requires consideration of the entire written instrument under construction.

3. In holding that the mortgage is clear and unambiguous, and, as related thereto, in excluding rules of construction applicable to ambiguous instruments in writing.

4. In holding that a subsequent advancement, not required by the mortgage, was, nevertheless, within its coverage, simply from the fact of the advancement, without act or writing tending to show that such subsequent advancement was made on the faith of the mortgage and so accepted by the mortgagors.

5. In stressing an affidavit made by an officer of Respondent Bank some two weeks after the November 24, 1956 loan, the affidavit representing plainly an after-thought, and in failing to consider the acts of the bankrupts in listing the subsequent indebtedness as an unsecured claim in their Bankruptcy Schedules.

6. In construing the mortgage as comprehensive of the subsequent loan, optional with the Respondent as to the

making thereof, witout any fact tending to disclose that it was made on the faith of the mortgage, a requirement held in the Indiana case of *Bowen et al.* v. *Ra[illegible]* (1895), 140 Ind. 393, 39 N. E. 860 (862).

7. In holding a subsequent, independent and unrelated advancement, in itself a separate contract, to be included within the coverage of the prior mortgage, thereby overriding the original terms thereof, and of the note secured thereby.

8. In sustaining a rule that might well effect the perpetuation of a mortgage through successive advancements made without obligation, and maturing on successive future dates as provided in the instruments evidencing the advances.

REASONS URGED FOR GRANTING THE WRIT.

The ruling below is contrary to the applicable law of Indiana as declared by its Supreme Court in the case of *Bowen et al.* v. *Ratcliff* (1895), 140 Ind. 393, 39 N. E. 860 (862), which holds that notes given for advances made after the execution of the mortgage, and *on the faith thereof*, are secured by it.

The ruling below is, also, contrary to the law of Indiana, as declared by its courts of last resort, which hold,

(a) That any doubt or uncertainty should operate against the mortgagee and not in his favor;

(b) That the acts and conduct of the parties to a contract are to be considered in relation to the construction of an ambiguous contract;

(c) That a contract under construction is to be construed as an entirety, and the intention of the parties, which is the lode star of construction, gathered from the contract so construed, if such may be done, otherwise, by

aid of the rules of construction applicable to ambiguous instruments in writing; and,

(d) That, to justify the inclusion of future advancements within the coverage of a mortgage, the parties must have so intended, and something affirmative done by them at the time of the advancement and, in addition thereto, an affirmative showing that the advancement was made on the faith of the mortgage.

ARGUMENT.

The case law in Indiana is not spelled out with particularity by the early cases dealing with the question of future advances claimed to be under the coverage of a prior mortgage.[1]

1. In *Brinkmeyer* v. *Brownoller et al.* (1876), 55 Ind. 487 (493-4) the liabilities to be secured, and agreed by the parties, were not to exceed certain stipulated sums. The consideration clause of the mortgage provided that it was given to indemnify and save harmless the mortgagee as surety or endorser within the stipulated limits. The facts, therefore, disclose a contractual liability, on the one hand to secure and on the other hand to assume liability as surety or endorser within the agreed limited amounts. No question was made as to the intent to secure the liabilities.

The Court made the following pertinent statement:

> "So, a mortgage * * * may be taken and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement."

Bowen et al. v. *Ratcliff* (1895), 140 Ind. 393, 39 N. E. 860 (862), involved a mortgage given to secure indebtedness not to exceed $10,000. The mortgage did not describe the specific indebtedness secured at the time of the execution of the mortgage. There were, however, two notes which, under the pleadings, were given after the mortgage was executed and were alleged to have been advances made to the mortgagor. Holding that any doubt or uncertainty should operate against the mortgagee, and not in his favor, the Court simply held that if the two notes were given for advances made on the faith of the mortgage, they were secured by it. The Court observed that whether or not the answer pleading the notes could be established was a trial resultant.

Schmidt et al. v. *Zahrndt* (1897), 148 Ind. 447, 47 N. E. 335 (336-7), involved, primarily, the then recording laws of Indiana. There was no question that the mortgage included the agreed advancements to be used in the contruction of a dwelling by the mortgagor, the only question being as to the amount needed. The case is not helpful in the instant matter.

In *New* v. *Sailors* (1888), 114 Ind 407, 16 N. E. 609 (610), the Court said:

> "It is essential that the character of the debt and the extent of the encumbrance be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors."

The case of *Bowen et al.* v. *Ratcliff* (1895), 140 Ind. 393, 39 N. E. 860 (862), lays down the rule that such advances must have been made on the faith of the mortgage to come within its inclusion. This rule presupposes that something, in addition to the advancement, is necessary to affirmatively disclose that the advancements were made on the faith of the mortgage, and trends the Indiana law with later cases in other states holding that, where the advancements are optional with the mortgagee, the provision in the mortgage is subject to construction as an offer of security by the mortgagor which requires acceptance by the mortgagee.[2]

2. In effect, the Indiana case of *Bowen et al.* v. *Ratcliff* (1895) 140 Ind. 393, 39 N. E. 860 (862), adopted the rule stated in the Text by holding that the future advances, even if comprehended by the mortgage, must, to come within its coverage, have been made on the faith of the mortgage. It is elementary that the constituent elements of a contract include offer and acceptance.

The Supreme Court of Ohio in *Second National Bank of Warren* v. *Boyle et al.* (1951), 155 Ohio St. 482, 99 N. E. (2d) 474 (476-8), after holding that, at most, provisions for security for future advances, which the mortgagee is not obligated to make, constitute but an offer of security by the mortgagor which requires acceptance by the mortgagee when making the subsequent advance, said:

> "This raises the question, in the instant case, as to whether the bank, by what it did and said *before* and *at* the *time* of the 1948 loan, expressed an intention that that loan was to operate as an acceptance of the 1946 offer of the mortgagor that the 1946 mortgage should secure indebtedness thereafter incurred by the mortgagor to the bank. Unless the bank did express such an intention, the action of the bank, in making the 1948 loan, would not represent the manifestation of assent to the mortgagor's offer which would be essential to the existence of a contractual obligation to secure the 1948 loan by the 1946 mortgage." (Italics ours.)

In the syllabus of the case, preceding the opinion, the following statement is made:

> "A mortgagee who claims that such mortgage does secure such a subsequent advance must allege that such advance was made either in reliance upon or on the faith of the security of the mortgage."

The quotation, just set out, discloses the analogy of the reasoning of the Ohio Court with that of the Indiana Court in the *Bowen* case, discussed earlier in this footnote.

We regard the rule as without exception where the advancements are optional, and we regard the rule as equivalent to that in Indiana which requires that the advances be made on the faith of the mortgage. Further, the Indiana rule is in harmony with the rule later discussed herein that the reference to other indebtedness in a mortgage, other than in the consideration and or defeasance clauses, is misleading, to say the least.

The Court of Appeals, after agreeing with the District Judge that there was no written or oral simultaneous pronouncement that the second loan was or was not within the mortgage coverage of paragraph 14, held, nevertheless, and in error, in our opinion, that paragraph 14 clearly provides coverage for any other indebtedness owing to the mortgagee by the mortgagors, including the note of November 24, 1956, and notwithstanding the conduct and acts of the parties which show that, at the time of the subsequent advancement, the prior mortgage and the security thereof, in relation to such subsequent advancement, was not in the mind of either party.

The Respondent, when it made the subsequent loan, accepted an ordinary form of promissory note, executed by Floyd Woodruff as engaged in business as American Cleaners & Dyers, at 1015 Main Street, and the signature of the wife is not related to the business.

Further, the affidavit of Kenneth O. Henke, made on December 6, 1956, is clearly an after-thought and negatives, rather than affirms, any intent that the subsequent loan be within the inclusion of the prior mortgage.

The listing of the Respondent by the bankrupts in their Schedules in Bankruptcy, as a secured creditor under the first note and mortgage, and as an unsecured creditor

under the subsequent note, clearly discloses their interpretation and understanding of the transaction, as independent of the original transaction.[3]

The note and securing mortgage, and the subsequent note, are on printed forms of the Respondent with blanks for insertion to meet the particular instance. Under the Indiana law such instruments are construed so as to subordinate the printed matter to the inserted matter written therein, since the latter represents, more nearly and accurately, the agreement of the parties. This rule would, necessarily, give precedence to the consideration clause of the mortgage, first, for the reason that it states the consideration for the instrument, and discloses the security, and, second, for the reason that it contains the inserted data concerned with the specific debt secured and the amount thereof.[4]

3. The transaction of November 24, 1956, and the note evidencing it contradict any claim, subsequently made by the Respondent, that such loan was made on the faith of the mortgage, while the affidavit made by an official of Respondent is but a self-serving declaration made as an after-thought, some two weeks after the transaction had been concluded.

The Referee found (R. 7), that the bankrupt listed Respondent as a secured creditor for $8300 and as unsecured for $46,000.

Where the terms of a contract are ambiguous or uncertain, a premise that we feel exists here, the practical interpretation of the contract by the parties, as shown by their acts and conduct, is entitled to great, if not controlling, weight.

Smith v. Board of Commissioners of Miami (1893), 6 Ind. App. 153, 33 N. E. 243 (245).

To the same effect is the case of *Albright v. Hughes* (1940), 107 Ind. App. 651, 26 N. E. (2d) 576 (580), where the Court said:

"This conduct is an exposition of the contract by the parties themselves, and they best knew what their intention was, and what they believed their contract to mean."

4. In *State v. Scott Construction Co.* (1931), 97 Ind. App. 652, 174 N. E. 429 (431), the Court said:

"It is a rule of construction of contracts that special provisions shall prevail over general provisions, and where, in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail, and handwriting, under the same rule, prevails over typewriting."

Paragraph 9 of the mortgage represents the defeasance clause thereof and it relates back to the specific debt secured, accelerates its payment and provides foreclosure on default of the mortgagors. While it refers to the performance of any other covenant in the mortgage or note secured, and sums payable pursuant to the provisions thereof, it is completely silent as to future loans. It is significant that paragraph 14 of the mortgage contains no covenant or agreement either to loan or to pay.

Since paragraph 14 of the mortgage contains no covenant or agreement, and imposes no obligation on either party it must either relate back to the specific indebtedness

5. It is significant that the Supreme Court of Indiana in *Bowen et al* v. *Ratcliff* (1895), 140 Ind. 393, 39 N. E. 860 (862), laid down the rule that any doubt or uncertainty should operate against the mortgagee and not in his favor.

This rule is consistent with the rule adopted in other states. In *Jacobs* v. *City National Bank of Ft. Smith* (1958), ... Ark. ..., 313 S. W. (2d) 789 (792), the Supreme Court of Arkansas was concerned with a mortgage claimed to comprehend future advances. Quoting from *Word* v. *Cole*, 122 Ark. 457, 183 S. W. 757, the Court held that a mortgage to secure future advances is valid, but that, if such purpose is intended to be accomplished, it must clearly appear from the instrument, and such purpose will not be presumed where the instrument does not contain a general description of the indebtedness secured so as to put one who examines it on notice that such was the purpose in order that such person may pursue the inquiry which such knowledge would suggest. Further, if other indebtedness to be incurred in the future is contemplated, it is not difficult to describe the nature and character thereof, so that both the debtor and third parties may be fully advised as to the extent of the mortgage. That sound policy demands no less, and that the rule is particularly applicable where the terms of the mortgage are sought to be extended by means of the language of the defeasance clause which is usually at the end of the mortgage and, in the prepared forms commonly in use, is in small type which escapes all but the closest scrutiny.

We respectfully make the observation that in the instant case the language relied on by Respondent is neither in the consideration nor the defeasance clause, but, on the contrary, is at the very end of the printed form and is, palpably related back to the primary indebtedness and to the contingent indebtedness arising from the payment of taxes and the like by the Respondent on the default of the mortgagors.

secured and amounts advanced by the mortgagee for taxes, insurance premiums, and the like, or it serves to render the mortgage ambiguous. Either horn of the dilemma is fatal to the decision of the Court of Appeals for the reason that it denied the "relation back" theory, and held the instrument, or rather, paragraph 14 thereof, clear and unambiguous.

The Court of Appeals observed that the Trustee argued that paragraph 14 of the mortgage implements the mortgage provisions, giving the Respondent a further lien for payment of taxes, etc., by it, and that those provisions require no implementation. But we respectfully submit, neither did the consideration clause setting out the debt secured, require implementation in respect to the renewal of the note secured, the law comprehending the secured debt regardless of changes in its form.[6]

The position of the Trustee was and is that, in the construction of the mortgage, paragraph 14 is, necessarily, related back to the consideration clause and the other contingent, but specific and further indebtedness to be secured by the mortgage. This position is consistent with the universal rule that a written instrument, under construction, is to be considered as an entirety.[7]

6. In *Dunell et ux. v. Terstegge* (1864), 23 Ind. 397, (398), 85 Am. Dec. 466, the Supreme Court of Indiana held that the debt is the thing secured, and the note but the evidence of it.

Following this rule, the Indiana Appellate Court in *Willetts v. Gifford et al.* (1910), 46 Ind. App. 185, 92 N. E. 186, (187) said:

> "A mortgage secures the debt, and not the evidence thereof. It is, therefore, the settled law that the mortgage secures the debt regardless of the changes in the form of the indebtedness."

7. In *Walker et al. v. Bement* (1911), 50 Ind. App. 645, 94 N. E. 339 (343), the Court said in respect to a mortgage under construction:

> "The intention of the parties is to govern, and this is to be gathered from the language of the instrument considered in the light of the settled rules of law relating to the construction of such contracts."

The loan of November 24, 1956, was not related to the prior mortgage nor was it comprehended thereby. The note evidencing it was a separate, independent and complete contract within itself.[8]

The validity of the inclusion of future advances under a mortgage, when properly and legally provided in the mortgage, is not a question in this proceeding. We are here concerned with a particular case, and the precise question is whether or not the mortgage in this case includes the subsequent loan by the Respondent, optional with the Respondent, and without connection with, or relation to, the mortgage given some five years prior thereto.

The law in respect to future advances is not clear and it is unsatisfactory, but the modern trend of the decisions is to limit and restrict the inclusion rather than to extend the rule, or broaden or liberalize the law in application to the subject.

It is readily conceivable that, under the extended rule approved by the Court of Appeals, a mortgage might be practically free of the Statute of Limitations, and perpetuated indefinitely, through successive advances, made optionally and without obligation, and which, if permitted to be comprehended by the mortgage, would necessarily extend it through the maturity of the debt.

WHEREFORE, we respectfully submit that certiorari should be here granted so that this cause may be reviewed and determined by this Court; and that the decision and judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed by this Court.

Respectfully submitted,

WILLIAM L. MITCHELL,
Attorney for Petitioner.

VICTOR AHRENS,
Of Counsel.

8. The case of *Brown* v. *First National Bank of Indianapolis* (1888), 115 Ind. 572, 18 N. E. 56 (60), recognizes the binding effect of a promissory note as a contract.

APPENDIX A.

OPINION OF THE COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

No. 12612.

In the matter of Floyd Woodruff and Dolly Wodruff,
Bankrupts.

Charles H. Sparrenberger, Trustee, etc.,
Appellant,
vs.
National City Bank of Evansville, Indiana,
Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.

December 14, 1959.

Before Major, Parkinson* and Knoch, Circuit Judges.

Knoch, Circuit Judge. The appellee, The National City Bank of Evansville, Indiana, filed its claim in these bankruptcy proceedings seeking, inter alia, to establish a secured claim for a $46,000 promissory note executed by the bank-

* While Judge Parkinson participated in the hearing of oral arguments and a conference of the division judges above-named, he was not present at the time of, and did not participate in, the adoption of this opinion. He concurred in the result reached in this opinion.

rupts on November 24, 1956, as covered by the real estate mortgage given to the Bank by the bankrupts on October 5, 1951, to secure the payment of a $16,000 promissory note of the same date, by virtue of paragraph 14 of the said mortgage which reads as follows:

> "14. This mortgage shall also secure any and all renewals of said promissory note or any part thereof. It is further agreed that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee."

The Referee denied the claim as a secured claim. On review the District Court reversed. This appeal by the Trustee in Bankruptcy followed.

The agreed facts are that on November 22, 1957, Floyd and Dolly Woodruff were adjudicated bankrupts on a voluntary petition. Prior thereto, on October 5, 1951, the Bank lent them $16,000. They executed their promissory note therefor and gave the Bank a mortgage on their real estate (containing paragraph 14 quoted above) to secure the payment of that note. The mortgage was duly recorded in Vanderburgh County, Indiana, the county in which the real estate was located. Claim for the unpaid balance of this note was allowed as a secured claim. It is not involved in this appeal.

On November 24, 1956, while the mortgage was in effect, the Bank lent the Woodruffs $46,000, for which they gave the Bank their promissory note.

On December 6, 1956, the Bank, acting by and through its Vice-President, Kenneth O. Henke, executed an affidavit giving notice that the said $46,000 indebtedness was intended to be secured by the aforesaid mortgage. The affidavit was duly recorded in Vanderburgh County, Indiana.

As the facts have been stipulated, we have before us a question of law, which the parties agree is to be determined

under the law of the State of Indiana; whether the mortgage is or is not valid security for the $46,000 indebtedness to the Bank, incurred by the Woodruffs subsequent to execution of the mortgage and while it was in effect.

Open-end provisions in a mortgage are valid in Indiana. A mortgage may be taken and held as security for future advances when a provision that such future advances will be covered by the lien, is made a constituent part of the original agreement. *Brinkmeyer* v. *Browneller*, 55 Ind. 487, 494 (1876). The Trustee contends that there is no valid mortgage for future advances here because the parties to the mortgage have not in clear, unambiguous and positive manner disclosed their intent that any further advances are comprehended by the mortgage and come within its coverage.

The Trustee argues that paragraph 14, instead of applying to future loans or advances, implements other provisions of the mortgage giving the Bank a further lien for any payments made by it for taxes, etc., upon the failure of the Woodruffs so to do. However, paragraph 7 of the mortgage provides:

> "7. In the event of the failure of the mortgagor to keep the buildings on said premises and those to be erected on said premises, or improvements thereon, in good repair, said mortgagee may pay such taxes, assessments, mortgage and hazard insurance, make such repairs as in its discretion it may deem necessary properly to preserve the property and any sums so paid shall be a further lien on such premises under this mortgage, payable forthwith, with interest at the rate of six per centum (6%) per annum until paid."

and requires no implementation.

The Trustee also contends that "where there is no obligation on the mortgagee, to make advances, or incur liabilities, which are, nevertheless, comprehended by the original

agreement, and constitute a constituent part thereof, but are optional with the mortgagee, the liabilities or obligations must, nevertheless, have been made on the faith of the security of the mortgage, in order to come within its coverage."

In support of this theory the Trustee cites *Brinkmeyer v. Brouneller, et al., supra; Bowen, et al. v. Ratcliff*, 149 Ind. 393 (1895); *Schmidt, et al. v. Zahrndt*, 148 Ind. 447 (1897); and *New, et al. v. Sailors*, 114 Ind. 407 (1888).

In *Brinkmeyer*, the Court said (page 494):

> "Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent encumbrance or conveyance of the mortgaged premises, before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or encumbrancer." (citing authorities.)

However, in that case, and in the subsequent case of *Brinkmeyer v. Helbing, et al.*, 57 Ind. 435, 449, (1877) the Court found that the mortgagee was bound to become the surety for an amount not to exceed the figure specified in the mortgage and that his knowledge of judgments subsequently rendered against the mortgagor prior to the mortgagee's making advancements to the mortgagor would not interfere with his right to hold the mortgage as security for the future advances.

In *Bowen v. Ratcliff*, it was averred that the mortgage did not set out the amount secured by it, when plaintiff, assignee of the mortgage, filed a petition for sale of the real estate, and asked the Court to ascertain the amount of the liens to be paid out of the proceeds of the sale.

The mortgage (page 395) read:

> "* * * to secure any notes that may be given for renewal of said notes or any part thereof, or for interest thereon, and any future advances or other indebtedness due or

that may hereafter become due, the mortgagees or either of them from the mortgagors or either of them, to the amount of $10,000."

The Court in Bowen held (page 397):

"It is essential that the character of the debt and the extent of the incumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of fraud upon creditors." (citing cases.)

and observed that the notes referred to by the words "Said notes," were not described and, hence, not secured by the mortgage. In accord with that reasoning the Court held that notes given in renewal would not be secured, but that the words "or other indebtedness due or that may hereafter become due etc." must be held to mean indebtedness other than future advances, or indebtedness evidenced by promissory notes. The answer alleged two notes in the amounts of $840.60 and $1000 given after the mortgage was executed and alleged that they were filed therewith and made a part thereof, and that they were given for advancements to the mortgagor. The Court found that the allegations could apply only to the two notes mentioned and held that if they were given for advances made after the execution of the mortgage and on the faith thereof, they were secured by the mortgage, but if given for, or in renewal of indebtedness not secured by the mortgage, they were not secured by it. Other notes alleged in the answer were held not to come "fairly within the terms used in the mortgage". (page 398) but these two notes were found to be "sufficiently described in the mortgage aided by the allegations in the answer to render said answer good against the demurrer" which had been erroneously sustained to the answer in the lower court. In the case before us, the factual situation is markedly different from that in the *Brinkmeyer* and *Bowen* cases.

In *Schmidt* v. *Zahrndt*, *supra*, Zahrndt sought to foreclose a mortgage executed by Schmidt and his wife. Zahrndt made Tuthill a party defendant. Tuthill had sold the real estate to Schmidt on a recorded deed. Schmidt had given Tuthill a promissory note for the unpaid purchase price and a mortgage on the real estate to secure it. The mortgage was not recorded within the 45 days required by Statute to avoid its being considered as void against a subsequent purchaser or mortgagee in good faith.

Meanwhile, Schmidt negotiated a loan from Zahrndt for $1000 to be paid to him as needed in the building of a house on the real estate. On June 1, 1893, he and his wife executed a mortgage on the real estate to secure the $1000 loan, evidenced by five promissory notes, all recorded June 6, 1893, well within 45 days of execution. Schmidt received $950 in all from Zahrndt, who had checked the records and found the deed to Schmidt but not the first mortgage which was not recorded until June 24, 1893.

The Court found Zahrndt's to be the first mortgage and Tuthill's the second on the real estate, although a part of the $950 had been advanced after the recording, but prior to actual notice of the Tuthill mortgage. The Court in this case quoted the proposition cited above in *Brinkmeyer*, with reference to optional advances, and held (page 452) that a prior mortgage duly recorded, had preference over subsequently recorded mortgages, not only for advances previously made, but for advances made after their recording without actual notice thereof; that recording the second incumbrance did not operate as constructive notice, but that actual notice was required. (citing case.)

New v. *Sailors*, *supra*, concerned a chattel mortgage which recited that (page 408):

> " * * the mortgagor was indebted to the mortgagee in the sum of $1,700, evidenced by a promissory note dated January 1st, 1883, for $1,200, and by standing

guaranty of $1,200 to Byram, Cornelius & Co., of the city of Indianapolis, and that if the mortgagor should well and truly pay the note at maturity and save the mortgagee harmless from the guaranty, then the mortgage was to be void."

On the strength of this mortgage the mortgagee claimed priority over the general creditors of the mortgagor for payment of some $900 on nine promissory notes, which he had signed as surety for the mortgagor to Byram, Cornelius and Company; $292.35 to the same company on an account due which he had guaranteed for mortgagor; and $258.98 to Butterworth and Company as surety for mortgagor.

Except for the $292.35, the Court found no showing in the pleadings or evidence that any of these debts had any relation to the mortgage which was specifically conditioned on a promissory note of $1200 due mortgagee and the guaranty for $1200 to Byram, Cornelius and Company. The Court did say that proper averments might have been made to show that the consideration for the $1200 note was related to the debts paid and evidence would have been admissible to explain the condition, or, in the case of ambiguity, to identify and apply the condition of the mortgage. In the absence of explanatory averments and proof, the Court declined to assume that debts which in no way corresponded to the description were within the terms of the mortgage.

Judgment in the lower court for the entire amount of $1451.96 was, therefore, reversed on the ground that it was not shown that the debt sued for was the debt in the mortgage.

None of these cases appears helpful in the case before us. We agree with the distinguished District Judge that:

"There are no facts present of other parol or written contracts, intervening third party liens or equities or ambiguities, and it is unnecessary to explore the State

of Indiana law on such subjects. There is no written or oral simultaneous pronouncement of the parties that the second loan was or was not within the mortgage coverage of paragraph 14, so the intent of the parties must be governed by paragraph 14 of that mortgage."

With some exceptions, none of which are here applicable, a trustee in bankruptcy " 'stands in the shoes of the bankrupt' and has no better title than the bankrupt had at the time of the filing of the petition." Collier on *Bankruptcy*, Vol. 4, pages 947-8. Thus the Trustee here occupies the same position as the Woodruffs. We are, therefore, concerned solely with the meaning and intent of the parties as expressed in the language used in the mortgage and the effect of that language as between the original parties themselves.

Paragraph 14 clearly provides that the mortgage shall not only secure any and all renewals of the promissory note specifically named therein, but shall, in addition, secure the payment to the mortgagee of any other indebtedness, which the mortgagors may, from time to time, owe the mortgagee, while the mortgage is in effect.

The judgment of the District Court is affirmed.

AFFIRMED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 718

In the Matter of

FLOYD WOODRUFF and DOLLY WOODRUFF,
Bankrupts.

CHARLES H. SPARRENBERGER,
Trustee in Bankruptcy,
Petitioner,

vs.

NATIONAL CITY BANK OF EVANSVILLE,
INDIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals is reported in 272 F. 2d 696 and is also reprinted as Appendix A to the petition for certiorari. The district court's findings and order appear at pages 46-49 of the record and the district court's judgment and order amending judgment appear at pages 49-50 of the record. The special finding of facts and conclusions of law and the opinion of the referee in bankruptcy appear at pages 39-45 of the record.

Jurisdiction

The judgment of the court of appeals was entered on December 14, 1959. The petition for a writ of certiorari was was filed on February 20, 1960. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

Questions Presented

The sole question is whether under the law of Indiana the mortgage executed by the bankrupts to the respondent on October 5, 1951, also secures the $46,000.00 loan made by respondent to bankrupts on November 24, 1956, and while said mortgage was still in effect, and which mortgage contains the following provision:

> "14. • • • . It is further agreed that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee."

Statement

This action was brought by the respondent against the petitioner before the Referee in Bankruptcy, in the above proceeding in bankruptcy, in the United States District Court for the Southern District of Indiana. This respondent sought to establish a secured claim by filing a written proof of claim. The respondent's proof of claim was submitted upon an agreed stipulation of facts together with Exhibits (R. 13-37). No additional evidence was offered or introduced by either the petitioner or the respondent.

The agreed facts are that on November 22, 1957, Floyd and Dolly Woodruff were adjudged bankrupts on a voluntary petition (R. 14). Prior thereto, on October 5, 1951, the respondent loaned the bankrupts Sixteen Thousand Dollars ($16,000.00) (R. 14). The bankrupts executed their promis-

sory note therefor and gave the respondent a mortgage on their real estate to secure the payment thereof (R. 16). Paragraph 14 of said mortgage contained the following provision:

> "14. This mortgage shall also secure any and all renewals of said promissory note or any part thereof. It is further agreed that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee." (R. 33).

The mortgage was duly recorded in Vanderburgh County, Indiana, the County in which the real estate was located (R. 16). On November 24, 1956, while said mortgage was still in effect, the respondent loaned the bankrupts the sum of Forty-Six Thousand Dollars ($46,000.00), for which they gave the respondent their promissory note (R. 15). On December 16, 1956, the respondent, acting by and through its vice president, Kenneth O. Henke, executed an affidavit giving notice that the said Forty-Six Thousand Dollars ($46,000.00) indebtedness was intended to be secured by the foregoing mortgage (R. 16). This affidavit was recorded in Vanderburgh County, Indiana (R. 16).

The Referee in Bankruptcy sustained the petitioner's written objections to respondent's proof of secured claim as to the Forty-Six Thousand Dollars ($46,000.00) indebtedness (R. 39-45). The district court, on respondent's petition to review, vacated the referee's conclusions of law and judgment and entered a judgment in favor of the respondent, affirming its claim as a secured claim as to both the balance of the original indebtedness and also the subsequent indebtedness (R. 46-50). This judgment was affirmed by the Court of Appeals (Pet. 15A).

Argument

The decision below is based on settled principles and is accordingly correct. It does not conflict with and it is not contrary to the applicable law of Indiana.

The sole reason urged by the petitioner for granting the petition for certiorari is that the decision below is contrary to the applicable law of Indiana. Respondent will demonstrate that the decision of the court below was clearly correct and was not contrary to Indiana law. Moreover, the issue of the validity of an open-end mortgage provision under Indiana law as between the original parties is not of sufficient importance to warrant review by this court.

The courts of last resort in Indiana have recognized the validity of open-end provisions in a mortgage. The decision of the Supreme Court of Indiana in *Brinkmeyer* v. *Brouneller* (1876), 55 Ind. 487, states at page 494 as follows:

> "'So, a mortgage or judgment may be taken and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will will be covered by the lien in preference to the claim under a junior intervening incumbrance, with notice of the agreement.'"

See also *Schmidt* v. *Zahrandt* (1897), 148 Ind. 447, 47 N.E. 335. In that case, the Indiana Supreme Court at page 337 states as follows:

> "'When the mortgage on its face gives such information as to the purpose and extent of the undertaking of the mortgage that anyone interested may, by the use of ordinary diligence, ascertain the extent of the incumbrance, then the better view seems to be that the mortgage will have precedence over subsequent incumbrances as to all advances made within the terms of a mortgage, whether made before or after such

> junior incumbrance, *even though the extent of the contemplated advances is not limited, and whether the mortgagee be bound to make the advances or not.*" (Our emphasis.)

See also *Bowen* v. *Ratcliff* (1895), 140 Ind. 393, 39 N.E. 860, where a demurrer to an answer had been sustained by the lower court. The answer set out the mortgage provisions at page 861 as follows:

> "* * * and to secure any notes that may be given for a renewal of said notes, or any part thereof, or for interest thereon, and any future advances or other indebtedness due, or that may hereafter become due, the mortgagees or either of them, from the mortgagors or either of them, to the amount of $10,000.00."

The Indiana Supreme Court went on to hold that the lower court erred in sustaining the demurrer as to two promissory notes that were executed after the date of the execution of the mortgage for the reason that they could have been future advances.

Respondent points out that *Bowen* v. *Ratcliff* (1895) 140 Ind. 393, 39 N. E. 860, is very similar to the instant case in that the mortgage provisions were similar and the court held that the two promissory notes executed subsequent to the date of the mortgage could be covered by the lien of the mortgage under the above quoted mortgage provisions.

The Indiana law is in accord with the overwhelming weight of authority in the United States in upholding the validity of open-end mortgage provisions similar to the one in the instant case.[1]

---

[1] *United States* v. *Hooe*, (1805), 3 Cranch 73, 2 L.Ed. 370; *First National Bank of Guntersville* v. *Baine* (1939), 237 Ala. 580, 188 So. 64; *American Savings Bank* v. *Kemp* (1913), 21 Calif. App. 571, 132 Pac. 617; *Union State Bank* v. *Chapman* (1927), 124 Kan. 315, 259 Pac. 684; *Bunker* v. *Barron* (1899), 93 Me. 87, 44 Atl. 372;

The petitioner concedes that the Supreme Court of Indiana, the highest Indiana court, has recognized the validity of open-end mortgage provisions, but argues that the rule is qualified to the extent that where the future indebtedness is optional with the mortgagee, the future indebtedness must be made on the faith of the mortgage. However, the petitioner fails to cite any Indiana authority, in fact there is no Indiana case, that holds that there must be some evidence in addition to the terms and provisions of the mortgage itself, where the mortgage is clear and unambiguous and purports on its face to include any and all future indebtedness.

Assuming *arguendo* that the Indiana law requires some additional proof that the subsequent indebtedness was secured on the faith of the prior mortgage, the sole and uncontradicted evidence in the instant case shows that the subsequent indebtedness was secured on the faith of the prior mortgage. In the instant case, all the facts were stipulated and agreed upon by the petitioner and the respondent. The petitioner stipulated and agreed that the respondent's Vice President, Kenneth O. Henke, executed an affidavit giving

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Citizens' Sav. Bank v. *Kock* (1898), 117 Mich. 225, 75 N.W. 458; *Rice Bros.* v. *Davis* (1903), 99 Mo. App. 636, 74 S.W. 431; *Wagner* v. *Breed* (1890), 29 Neb. 720, 46 N.W. 286; *Chartz* v. *Cardelli* (1929), 52 Nev. 1, 279 Pac. 761; *Robinson* v. *Williams* (1860), 22 N.Y. 380; *Batten* v. *Jurist* (1932), 306 Pa. 64, 158 Atl. 557; *Klein* v. *Glass* (1880), 53 Tex. 37; *McDaniels* v. *Colvin* (1844), 16 Vt. 300, 42 Am. Dec. 512; *Carey* v. *Herrick* (1928), 146 Wash. 283, 263 Pac. 190; *Carlson* v. *Oppenheim Co.* (Mass.; 1956), 136 N.E. (2d) 205; *Thompson on Real Property*, Volume 9, section 4930, pages 324-326; 59 CJS 217, Mortgages, section 176; 36 Am. Jur. 721, Mortgages, Section 64; 81 A.L.R. 631, page 632; *Vidalia Production Credit Association* v. *Durrence* (1957), 212 Ga. 432, 94 S.E. (2d) 609; *Ferguson* v. *Mueller* (1946), 115 Col. 139, 169 P. (2d) 610; *First National Bank of Plains* v. *Green Mountain Soil Conservation District* (Mont.; 1957), 293 P. (2d) 289; *Gilpatrick* v. *Hatter* (Okla.; 1953), 258 P. (2d) 1200; *In re Turner* (D.C. Ky.; 1943), 51 F. Supp. 740; *Bagley* v. *Page* (1937), 57 R.I. 186, 189 Atl. 39.

notice of the fact that the respondent's subsequent indebtedness was intended to be secured by the prior mortgage (R. 16). Respondent submits that under this evidence, it made the Forty-Six Thousand Dollars ($46,000.00) subsequent loan to the bankrupts on the faith of the prior mortgage. This evidence is undisputed and uncontradicted anywhere in the entire record.

Obviously, the petitioner disagrees with the District Court and the Court of Appeals and argues that Paragraph 14 of the mortgage, which is the open-end provision in question, does not include the subsequent indebtedness of November 24, 1956. The petitioner, at pages 10 and 11 of his petition, advances certain rules of construction, supported by authority, which he contends should be used in construing ambiguous instruments.

Respondent submits that none of these aids to construction are applicable in the instant case, because all of the written instruments pertaining to this matter, including Paragraph 14 of the mortgage, are clear and unambiguous. Paragraph 14 of the mortgage states in part:

> "It is further agreed that this mortgage shall secure the payment to mortgagee of *any other indebtedness* which mortgagors may *from time to time, while this mortgage is in effect*, owe the mortgagee." (Our emphasis.)

Respondent submits that the portion of Paragraph 14 quoted above leaves no doubt or question as to the intent of the parties. The quoted phrase did not just include "other indebtedness." Paragraph 14 goes beyond this and comprehends all other indebtedness by the use of the phrase "any other indebtedness." Paragraph 14 further clearly shows that it was intended to include "any other indebtedness" which the mortgagors might owe the mortgagee at any time in the future, or "from time to time" while the mortgage was in effect.

In the instant case, it was stipulated by and between the parties that on the 24th day of November, 1956, the respondent loaned to the bankrupts the principal sum of $46,000.00, and that a promissory note was executed by the bankrupts therefor (R. 15-16). The stipulation of facts further shows that the mortgage of October 5, 1951 (R. 27-33), was in effect on November 24, 1956 (R. 14-17). The $46,000.00 indebtedness of the bankrupts certainly constitutes "other indebtedness" which they owed respondent bank, in addition to the original $16,000.00 loan. The stipulation of facts further shows that the Vice President of respondent bank executed and recorded an affidavit giving notice of the fact that the $46,000.00 indebtedness was intended to be secured by the prior mortgage (R. 16). Thus, Paragraph 14 of the mortgage, by its unambiguous terms, includes "any other indebtedness" and, therefore, certainly included the $46,000.00 note. In addition, the uncontradicted facts contained in the stipulation show that the $46,000.00 note was intended to be secured by the mortgage (R. 16).

The respondent points out that the Indiana rule which is applicable to the instant case, is that stated by the Supreme Court of Indiana in the leading case of *Jenkins* v. *King* (1946), 224 Ind. 164, 65 N.E. (2d) 121, where at page 123 of the Northeastern Reporter, the Court said as follows:

> "A court must give effect to the meaning and intention of the parties as expressed in the language of their contract, in the absence of anything to show legal impediment to prevent their entering into any contract they see fit or their expressing it in the language of their own choice. Where there is no right to the reformation of a written contract, the rights of the parties must be determined according to their writing.
>
> "In the absence of an ambiguity it is not within the function of the judiciary to look outside of the instru-

> ment to get at the intention of the parties. Their sole duty is to find out what was meant by the language of the instrument. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used. * * *."

The petitioner further argues that Paragraph 14 of the mortgage related back only to the consideration clause and the other contingent, but specific and further indebtedness to be secured by the mortgage, such as taxes, insurance and repairs and that the Court of Appeals erroneously denied this "relation back" theory. An examination of the entire mortgage instrument shows clearly how fallacious petitioner's argument is.

First, the consideration clause provides that the mortgage is

> "* * * also to secure the faithful performance of all the covenants, conditions, stipulations and agreements herein contained, * * *" (R. 28).

Paragraph 14 of the mortgage provides in part:

> "It is further *agreed* that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee." (Our emphasis) (R. 33).

It is obvious that Paragraph 14 of the mortgage contains an agreement by its express terms and the consideration clause specifically covers all the agreements contained in the mortgage. Therefore, the mortgage was made in consideration, among other things, of the agreement that the mortgage should secure any other indebtedness, including subsequent indebtedness.

Paragraph 3 of the mortgage contained an agreement that the mortgagors shall pay all taxes, assessments, water rates and other governmental charges (R. 29). Paragraph 4 of the mortgage provides that the mortgagors shall maintain the mortgaged premises in good repair and condition (R. 29-30). Paragraph 5 provides that the mortgagors shall keep the improvements on the property insured against loss by fire or other hazards (R. 30). Paragraph 6 of the mortgage provides that in the event of foreclosure of the mortgage any sums expended for continuation of the abstract of title shall become a part of the debt of the mortgage (R. 31). Paragraph 7 of the mortgage provides that:

> "In the event of the failure of the mortgagor to keep the buildings on said premises and those to be erected on said premises, or improvements thereon, in good repair, said mortgagee may pay such taxes, assessments, mortgage and hazard insurance, make such repairs as in its discretion it may deem necessary properly to preserve the property and any sums so paid shall be a further lien on such premises under this mortgage, payable forthwith, with interest at the rate of six per centum (6%) per annum until paid." (R. 31.)

Respondent submits that it is obvious that Paragraph 7 of the mortgage was included for the sole and express purpose of having the lien of the mortgage extend to and cover the specific items set out in Paragraphs 3, 4, 5 and 6 of the mortgage and consequently, that Paragraph 14 of the mortgage was not included to cover these specific items. To construe the mortgage otherwise would be a duplication.

After Paragraph 7 of the mortgage expressly extended the lien of the mortgage to the specific items set out in Paragraphs 3, 4, 5 and 6 of the mortgage, Paragraph 14 of the mortgage then expressly covers any other indebtedness which the mortgagors may owe to the mortgagee in the fu-

ture while the mortgage is in effect. The Court of Appeals correctly denied petitioner's so-called "relation back" theory because the mortgage is clear and unambiguous and plainly speaks for itself.

Respondent submits that the Court of Appeals correctly held that the mortgage was unambiguous when it said in its decision below:

> "Paragraph 14 clearly provides that the mortgage shall not only secure any and all renewals of the promissory note specifically named therein, but shall, in addition, secure the payment to the mortgagee of any other indebtedness, which the mortgagors may, from time to time, owe the mortgagee, while the mortgage is in effect." (Pet. A 22)

Conclusion

Since the decision below is correct, and there is no conflict with the Indiana decisions or law, and since the question presented by this case is neither significant nor novel, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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